IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.03.2007

CORAM

THE HONOURABLE MR. JUSTICE P.JYOTHIMANI

Second Appeal No. 821 of 2006 &
M.P.No.1 of 2006

T.Tamilarasan . . Appellant/Plaintiff

Versus

1.Arokkiasamy
2.Thomas
3.Devasagayam . . Respondents/Defendants

Prayer: This second appeal is filed against the judgment and decree dated 29.11.2005 made in A.S.No.19 of 2005 on the file of the Principal Sub Court Erode, reversing the judgment and decree dated 09.01.2004 made in O.S.No.64 of 2003 on the file of the District Munsif cum Judicial Magistrate, Perundurai.

For Appellant :Mr.N.Manoharan
For Respondents:Mr.V.Ayyadurai

JUDGMENT

The plaintiff in the trial court is the appellant in the second appeal. The suit was filed for a permanent injunction against the defendants from interfering with the plaintiff's possession of the property which is to an extent of 459 sq. metres of house site with thatched shed and mamool pathway rights comprised in R.S.F.No.1044/3 in Pallapalayam Village, Perundurai Taluk, Erode District.

2.The claim of the plaintiff was based on the patta issued by the Special Tahsildar on 31.05.1993 which was marked as Ex.A1. It was further the case of the plaintiff that the defendants who have nothing to the do with property have attempted to interfere and demolished the thatched shed which has resulted in filing the above said suit.

3.On the other hand, the defendants in the written statement

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

have categorically stated that the plaintiff is the absolute owner of the property situated in R.S.F.No.1044/3 as per the Patta dated 31.05.93. However, in the later part of the written statement, the defendants have stated that property comprised in R.S.F.No.1044/3 was subsequently divided into 5 parts and separate pattas were issued to five persons. It is the case of the defendants that originally the property belonged to one Jeevanandam who is the father of defendants 2 and 3 and grand father of the first defendant and the plaintiff. The said Jeevanandam has five sons namely Themothan who is the father of the plaintiff, Joseph the father of the first defendant, Thomas the second defendant, Devasagayam the third defendant and Jayaraj. After the division of the said property, S.F.No.1044/3 was allotted to the plaintiff and his brother namely Anbalagan, S.F.No.1044/3B was allotted to the first defendant's father Joseph, S.F.No.1044/3C was allotted to the second defendant, S.F.No.1044/3D was allotted to the third defendant and Jayaraj was allotted the property situated in S.F.No.1044/3A.

4.According to the defendants, the suit property allotted to the plaintiff and his brother Anbalagan comprised in S.F.No.1044/3 is still vacant land and the plaintiff is actually living as a tenant under the first defendant's house on a monthly rent of Rs.300/- in the house allotted to the first defendant comprised in S.No.1044/3B. Since the plaintiff failed to pay the rent consistently, due to fear of his being vacated through process of law, the suit is filed.

5. It is seen that the plaintiff has filed the patta issued in his name marked as Ex.A1 dated 31.5.93. On the other hand, the defendants side has not filed any documents and on appreciation of the entire factual position, the trial Court has given a finding that the plaintiff is in possession of the property and has decreed the suit. In fact the trial court has also stated that the defendants have not filed any documents.

6.Aggrieved over the said judgment of the trial court, the defendants have filed the first appeal before the appellate Court. Along with the first appeal the defendants have also filed I.A.No.19/2005 for receipt of additional documents with the contention that while it is true that the plaintiff was given patta under Ex.A1 dated 31.05.93 and the said patta was subsequently cancelled by the revenue authorities on the application filed by the defendants and the patta has been granted in favour of the defendants and they were not filed in the trial court since they were not able to trace out. In spite of the opposition to the said application, the First appellate Court has allowed the said application filed under Order 41 Rule 27 CPC. Thereafter, the first appellate Court has taken up the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

appeal and reversed the judgment of the trial Court on the basis that the patta issued in favour of the plaintiff under Ex.A1 dated 31.5.93 has been cancelled subsequently, as it is seen in the additional documents. In view of the same, the first appellate Court has come to the conclusion that the plaintiff is not in possession and allowed the appeal of the defendants and set aside the judgment and decree of the trial Court. It was as against the judgment and decree of the first appellate Court, the plaintiff has filed the present second appeal.

7.At the time when the second appeal was admitted, this Court has framed the following substantial questions of law;

> 1.Whether the first appellate court is correct in law in reversing the permanent injunction granted by the trial court, despite the admission made by the defendants in their written statement as well as in the oral evidence of DW.1 and DW.2 which enables the plaintiff to succeed in the suit in view of Sections 17, 21 and 58 of Indian Evidence Act?
>
> 2.Whether the First appellate Court has properly appreciated and applied the principles to find out the admissibility of the additional documents in the first appeal especially when the respondents herein have failed to comply with the mandatory requirements as contemplated under Rule 27 and 28 of Order 41 CPC?
>
> 3.Whether the documents came into existence subsequent to the filing of the suit and marked as Exhibits in the appellate stage is relevant for the purpose of the case particularly when the pleading and oral evidence adduced by the defendants will support the case of the plaintiff?

8.I have heard Mr.N.Manoharan, learned counsel appearing for the appellant and Mr.V.Ayyadurai learned counsel appearing for the respondents.

WEB COPY

9.The learned counsel appearing for the appellant would submit that in the written statement the defendants have categorically admitted the ownership of the plaintiff on the basis of the patta issued under Ex.A1 in favour of the plaintiff, and it is also the specific case of the defendants in the written statement that even though it is contradictory to first part that subsequently the suit property was divided into five parts and

https://hcservices.ecourts.gov.in/hcservices/

each of them got one part, the plaintiff and his brother Anbalagan was allotted the property comprised in S.F.No.1044/3. For the first time the subsequent documents which are relating to the period 2001 were filed before the first appellant Court and the First appellate Court without even following the procedure contemplated under Order 41 Rule 27 and 28 CPC, has simply allowed those documents as additional evidence and based on which the first appellate Court has come to the erroneous conclusion as if the patta originally given to the plaintiff under Ex.A1 dated 31.5.93 stood cancelled and on that basis the suit was dismissed ignoring the fact of the categoric admission of the defendants in the written statement that the plaintiff was in possession and he is the absolute owner of the property. Therefore, according to the appellant, there is a patent error committed by the first appellate Judge in not only following the Order 41 Rule 27 and 28 CPC but also wholly deciding on the basis of the additional documents to come to the conclusion as if the defendants are in possession.

10.On the other hand, Mr.Ayyathurai, learned counsel appearing for the respondents would submit that when once it is the case of the defendants that the patta was given to the plaintiff in 1993 has been cancelled after 2001, by the competent authorities in law it was only for the plaintiff to challenge the cancellation in the manner known to law and after cancellation no Court can rely upon Ex.A1 dated 15.03.93 and the first appellate Judge has correctly come to the conclusion by accepting the additional documents and dismissed the suit filed by the plaintiff.

11.A reference to the judgment of the First appellate Court would show that the judgment and decree of the trial Court was reversed solely on the basis of the documents which were received as additional documents in the appeal stage and marked as Ex.B2 to Ex.B9 and also holding that the plaintiff has suppressed the fact that his patta under Ex.A1 has been cancelled and mislead the trial Court.

12.Order 41 Rule 27 and 28 CPC contemplates the procedure to be followed for production of additional evidence in the appellate Court. The said provision stated as follows;

> 27.Production of additional evidence in Appellate Court:-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-
>
> (a)the Court from whose decree the appeal is preferred has refused to admit evidence

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

which ought to have been admitted, or

(aa)the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or)

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced or witness to be examined.

(2)Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

(28)Mode of taking additional evidence:- Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other Subordinate Court, to take such evidence and to send it when taken to the Appellate Court."

13.Therefore it is clear that when in the appellate Court it is established that notwithstanding due diligence such evidence could not be produced during the trial Stage or in cases were the appellate Court requests the document to be produced for pronouncing judgment or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced or witness to be examined. It is also made clear that in cases were the appellate Court takes a decision to allow the additional evidence, it is to direct the Court from whose decree the appeal is preferred, or any other Subordinate Court, to take such evidence and to send it to the Appellate Court for decision. Therefore, there are two steps when additional evidence is filed before the appellate Court namely;

1)When the appellate Court is satisfied when such additional evidence is required to be produced the appellate Court shall pass an order with giving reasons.

2.Thereafter, either the appellate Court itself can take evidence or direct the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

subordinate Court to take evidence for proving the additional documents and sent the report so as to give a final decision in the present case.

14.A reading of the Judgment of the first appellate Court shows that the first appellate Court has straight away taken the additional documents filed on behalf of the defendants in the suit who were appellants before the first appellate Court without even giving any opportunity to the plaintiff to disprove the veracity or otherwise of such documents by way of evidence and the first appellate Court has considered as if those documents were proved and chosen to pass final judgment which is a patent error committed by the first appellate Court in not following the code of Civil Procedure Code scrupulously. It is relevant to point out at this stage that the plaintiff has been given opportunity to file counter affidavit in the application for receipt of the additional evidence. It is one thing to say that the first appellate Court has allowed the documents to be produced and another thing to prove the document through proper method of evidence. In the present case, the second aspect has not been followed by the first appellate Court.

15.In such circumstances, there is absolutely no difficulty to come to the conclusion that the reliance placed on those documents which are not proved before the Court below cannot be sustained. There is one other circumstance as pointed out by the learned counsel for the appellant namely that in the written statement filed by the defendants it is not even their case that the patta issued to the plaintiff on 31.05.93 marked as Ex.A1 has been cancelled by the revenue authorities. On the other hand, it is the categoric admission of the defendants in the written statement that the plaintiff is the absolute owner of S.F.No.1044/3 in the following words of assertion;

> 3.It is true that the suit property is situated at Pallapalayam Village, Perundurai Taluk and the plaintiff is the absolute owner of S.F.No.1044/3 as per Patta dated 31.05.1993."

Having stated so, in the later portion of the written statement, the defendants have chosen to state that the revenue authorities have divided the suit property into various parts and one part was allotted to the plaintiff and his brother Anbazhagan in S.F.No.1044/3. Further stating that some other defendants have been given some properties which is as follows;-

> "7.The Government has divided the suit property and other properties into five and issued separate Patta to each son of Jeevanantham as per enjoyment.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

The S.F.No. Of the property that allotted to the plaintiff and his brother Anbazhagars is 1044/3. The Survey field that allotted to the first defendant's father J.Joseph is 1044/3-B. The Survey filed that allotted to the second defendant is 1044/3-C. The Survey field that allotted to the third defendant is 1044/3D. The survey field that allotted to Jayaraj is 1044/3-A. The suit property is still a vacant land and the plaintiff is actually residing in the first defendants house for a monthly of Rs.300/-. For the past several month the plaintiff defaulted in payment of monthly rent."

16.It is very clear that the defendants have made a specific case in the appellate Court that the patta granted in favour of the plaintiff under Ex.A1 was cancelled by the revenue authorities which was never the case in the written statement of the defendants at all. In spite of that the first appellate Court has come to the conclusion of presumption stating that the "patta granted to the plaintiff seems to have been cancelled subsequently". In any event, whether such patta granted to the plaintiff under Ex.A1 was cancelled by the revenue authorities in accordance with law or not, and subsequent issuing of various documents in favour of the defendants namely Adangals etc., relied by the defendants are all the matters which have to be decided on proof of evidence after giving opportunities to the plaintiff and mere production of the document is not sufficient to come to the conclusion that the plaintiff is not in possession.

17.In a similar circumstance as correctly pointed out by the learned counsel for the appellant, this Court had an occasion to decide about the validity of such orders passed by the appellate Court under Order 41 Rule 27 and 28 CPC and that was the case decided in SRI VARADHARAJA PERUMAL TEMPLE v. JEYAKUMAR reported in 2005 1 L.W. 444 the operative portion of the judgment is as follows;-

"14. . . .

The reasonings recorded by the first appellate Court in paragraph-13 is not in accordance with Order 41 Rule 27 C.P.C. No finding is given as if the documents were sought to be produced before the trial Court. Whereas the trial Court refused to admit the evidence, which ought to have been admitted. Further, I find no finding that the appellant/defendant in A.S.No.60/92 was unable to produce the document despite the exercise of due diligence, such as the same

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

was not within his knowledge or he was unable to produce the same, after the exercise of due diligence, etc. This being the position, by allowing the document, to be marked in the appellate stage, without giving an opportunity to the other side, to question the same by way of cross examination, the appellate Court deprived the right of opportunity to the plaintiff. In this view, in my considered opinion, the admission of the additional evidence viz., Exs.B3-B5 are not legally sustainable, which alone appears to be the basis for allowing the appeal. Exs.B3 to 5 are not the documents emanated between the parties and it seems, the notice and reply notice is not connected with the plaintiff temple. This being the position, the plaintiff temple should have been given an opportunity to explain under what circumstances these documents might have come into existence, such as the documents are prepared for the occasion or the recitals if any, adverse against the temple are not binding upon the temple etc. Thus, depriving the right of the temple, as if these documents are all admitted documents a finding given by the learned Additional Subordinate Judge, Cuddalore, is legally not sustainable. Even taking into account that these documents could be admitted as evidence, as submitted by the learned counsel for the appellant, the alleged admission contained therein or the recitals, could not be taken as the monumental proof to establish the relationship between the parties, as landlord and tenant."

18.The effect of a party in not appearing in the witness box offering himself to be cross examined but only filing a statement of oath has been held to be a case of adverse inference to be drawn against him as per Section 114 of Evidence Act. The conduct of the party in not entering into the witness box and the law on this aspect as per the adverse inference has been settled by the Honourable Supreme Court in the judgment rendered in VIDHYADHAR v. MANKIKRAO reported in 1999 AIR SCW 1129 by referring to the various judgments of the High Courts and the Privy Council in the following manner which is as follows;

"16.Where a party to the suit does not

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

> appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbaksha Singh v. Gurdial Singh, AIR 1927 PC 230. This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh, AIR 1930 Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh, AIR 1931 Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat, AIR 1970 Madh Pra 225, also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (AIR 1927 PC 230) (supra). The Allahabad High Court in Arjun Singh v. Virender Nath, AIR 1971 Allahabad 29 held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab and Harayana High Court in Bhagwan Dass v. Bhishan Chand, AIR 1974 Punj and Har 7, drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box.

19.However in the present case, by applying the said rulings of the Honourable Supreme Court the first appellate Court has not appreciated the correct distinction between the production of documents and proving of the documents as additional evidence. In such circumstances, when the law is clear on this aspect, it can never be said as if the plaintiff has waived his right. In view of the above said facts, the judgment and decree of the first appellate Court are set aside and the second appeal stands allowed and the matter is remanded back to the first appellate

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Court with a direction to follow the provision of Order 41 Rule 27 and 28 CPC scrupulously by giving opportunities to both the parties as indicated above and pass appropriate judgment. The second appeal stands allowed in the above terms. Consequently, connected miscellaneous petition is closed. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

jikr

To

1.The Principal Subordinate Judge,
Erode.

2.The District Munsif-cum-Judicial Magistrate,
Perundurai.

3.The Record Keeper,
VR Section, High Court, Madras.

+1cc to Mr.V.Ayyadurai,Advocate Sr 17615
+1cc to Mr.N.Manokaran, Advocate Sr 18053

GM (CO)
km/13.4.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/